IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCOTT A. MORGAN, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
RONALD W. ROSSI, et al.	:	No. 96-1536

O'Neill, J April , 1998

MEMORANDUM

In this 42 U.S.C. § 1983 action, plaintiffs Scott Morgan and Michael Lakis, former Lehigh County Deputy Sheriffs, allege that defendants Sheriff Ronald Rossi and Lehigh County discharged them from their employment with the County in violation of their First Amendment rights. Plaintiffs also allege a pendant cause of action pursuant to Pennsylvania's Whistleblower Law, 43 Pa.C.S.A. 1421, et seq. Before me are defendants' motions for summary judgment and plaintiffs' motion to disqualify John P. Karoly, Esq. as attorney for defendant Ronald W. Rossi. For the reasons that follow I grant defendants' motions for summary judgment on the Whistleblower claim, deny defendants' motions for summary judgment on the remaining claims, and grant plaintiffs' motion to disqualify Mr. Karoly.

I. Factual Overview

Defendant Rossi was first elected Sheriff of Lehigh County in 1991 and began his four year term in January, 1992. In that election he defeated incumbent Sheriff Ronald Neimeyer, under whom plaintiffs had served. In 1995, Rossi successfully ran for re-election, again defeating Neimeyer.

In October, 1995, shortly before the election, Lehigh County was the site of the highly publicized homicide trial of Jeffrey Howorth, who was accused of murdering his parents. During

the weekend of October 20, 1995 the jury was sequestered in a hotel, and Morgan and fellow deputy sheriff A.D. Wiggins were assigned to protect the sequestered jurors. In the early morning hours of October 22, 1995, Wiggins allegedly made an unwelcome sexual advance toward a female juror. ("Howorth juror incident" or "juror incident")[1]

Morgan, who was assigned to the same jury but was stationed on a different floor, became aware of the incident. After an unsuccessful attempt to reach Rossi, he spoke to Sheriff Office Solicitor Karoly, who, according to Morgan, told him not to contact the trial judge or the media because of the pending election. The trial judge was not advised of the juror incident and the jury continued their deliberations. Later the same day, October 22, 1995, the jury returned a verdict of not guilty by reason of insanity.

On Monday, October 23, 1995, Lakis, on behalf of Morgan and himself, reported the jury incident to Lehigh District Attorney Robert Steinberg. Morgan spoke to Steinberg several days later. Steinberg referred the case to the Pennsylvania Attorney General's Office, which initiated an investigation. According to Morgan, when the news media began printing inaccurate accounts of what occurred, he, with the advanced approval of the juror, spoke at a press conference in which he claims he described the actual events of October 22, 1995.[2]

With the election approaching, both plaintiffs state that they assisted Neimeyer in his campaign by hanging signs, attending fundraisers and other public events, and talking to family and friends about their support for Neimeyer. Shortly after Rossi defeated Neimeyer, plaintiffs allege

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[1] Deputy Wiggins denies that he made a sexual advance and he was never charged with any crime as a result of this incident.

[2] The press conference was held after hours.

that Rossi made various statements to members of the sheriff's office that their failure to support him in his election might result in retaliation. Plaintiffs were dismissed approximately three weeks later.[3]

II. Discussion - Motion for Summary Judgment

Plaintiffs have alleged two different violations of their First Amendment rights.[4] The first claim is that defendants violated their First Amendment right "to associate with others for the common advancement of political beliefs," Elrod v. Burns, 427 U.S. 347, 357 (1976) (citations omitted), by terminating them for supporting Rossi's opponent in the 1995 election. The Court of Appeals refers to these claims as "political discrimination" claims. See Steven v. Kerrigan, 122 F.3d 171, 176 (3d Cir. 1997). The second claim is that Morgan was terminated in retaliation for disclosing the actual events surrounding the juror incident at a press conference in violation of his First Amendment right to free speech. Plaintiffs also claim a right to recovery pursuant to Pennsylvania's Whistleblower Law based on their disclosure of the juror incident to District Attorney Steinberg. Defendants seek summary judgment on all claims.

A. Summary Judgment Standard

In reviewing a motion for summary judgment, I must consider whether the pleadings,

[3] The parties expended considerable energy arguing about whether Rossi dismissed plaintiffs or refused to "recommission" them. This difference is of no import to my analysis below because a political discrimination claim such as this is actionable after any adverse employment action. See Stevens v. Kerrigan, 122 F.3d 171, 176 (3d Cir. 1997); Burns v. County of Cambria, Pa., 971 F.2d 1015, 1025 (3d Cir. 1992). In accordance with the summary judgment standard outlined below, I will refer to the adverse employment action as a termination or dismissal.

[4] Defendants spent much of their brief addressing a procedural due process claim and arguing that plaintiffs were at-will employees with no property interest in continued employment. Plaintiffs state in their reply brief that they are not asserting a procedural due process claim.

depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). To determine whether there is a genuine issue of material fact, I must ask whether a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). I must draw all reasonable inferences in favor of the nonmovant. Id. at 256. Where, as here, the nonmoving party bears the burden of proof at trial, the moving party bears the initial burden of showing an absence of factual issues. Once this burden is met, the nonmoving party must then establish sufficient evidence for each element of their case challenged by the moving party. J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), citing Celotex v. Catrett, 477 U.S. 317, 323 (1986).

B. Political Discrimination Claim

Analysis of political discrimination claims employs a burden-shifting mechanism similar to the one utilized in other employment discrimination contexts. Steven, 122 F.3d at 176. To make out their prima facie case, plaintiffs must show that they worked for a public agency in positions that do not require political affiliation, that they were engaged in constitutionally-protected conduct, that each suffered an adverse employment action, and that their protected conduct was a substantial or motivating factor in the public agency's decision. Id. (citations omitted). For purposes of the "substantial or motivating factor" element of the prima facie case, once defendant articulates a nondiscriminatory reason for the employment action, plaintiffs "may prevail by discrediting that proffered reason . . . or by adducing evidence . . . that discrimination was more likely than not a motivating or substantial cause of the adverse action." Id. at 181. If plaintiff makes out this prima

facie case, defendants may avoid liability by proving by a preponderance of the evidence that the same employment action would have been taken even in the absence of the protected activity. Id. at 176 (citations omitted).

It is not disputed that plaintiffs worked for a public agency in positions that do not require political affiliation,[5] that supporting Rossi's opponent in the election was constitutionally protected conduct and that each suffered from an adverse employment action. Defendants, however, contend that plaintiffs were discharged not because of their political affiliation, but because of poor job performance. In fact, defendants contend that Rossi was not even aware of plaintiffs' opposition to his candidacy and therefore their opposition could not have been the basis for their termination. Accordingly, they argue that plaintiffs cannot meet their burden of showing that their constitutionally protected conduct was the motivating or a substantial factor underlying their termination.

In his affidavit Rossi states that he "was unaware of [the plaintiffs'] political preferences, much less activities, in relation to the sheriff's election of November of 1995." Rossi Aff. ¶ 23. To refute this assertion plaintiffs point to contrary evidence. In Rossi's deposition, he was asked about a photo taken of various individuals, including Lakis, at Neimeyer's campaign headquarters on election night that was published in the next day's newspaper. Rossi testified as follows:

> Q. Do you recall seeing a picture taken of, I think it was, an election night gathering at Mr. Neimeyer's campaign headquarters which included Mr. Lakis and Miss Hanley?
> A. Saddest group I ever saw.
> Q. Does that mean that you saw them?
> A. Yes, in the newspaper.
> Q. Having seen that did you conclude they supported Mr. Neimeyer?

[5] See County of Cambria, Pa., 971 F.2d at 1022-23 (defendant "failed to demonstrate that firing deputy sheriffs for their political affiliation or activities comes within the narrow exception recognized for political dismissals").

A. I don't think you have to be a rocket scientist to figure that out.

Rossi Dep. at 201. Rossi also testified that he heard rumors that Lakis was putting up election signs. Id. at 210. Lakis also testified that he spoke freely to many people about his support for Neimeyer, that he attended various public events for Neimeyer, and that it was common knowledge in the County that he supported Neimeyer. Lakis Dep. at 53, 63, 67, 75. In addition, on one occasion shortly before the election, Lakis and his family were wearing "Vote for Neimeyer" T-shirts when they walked by Rossi. Id. at 62. Lakis testified that Rossi saw him and his family and that Rossi nodded at him. Id. From this evidence a jury could conclude that Rossi was aware of Lakis' support for Neimeyer before Rossi terminated him.

Morgan also presented sufficient evidence to support an inference that Rossi was aware of his support for Neimeyer. Morgan attended a golf fundraiser for Neimeyer, hung signs, advocated for Neimeyer to family and friends, and attended Neimeyer's election night gathering. (Answers to Inter., County Ex. Q). When asked about his awareness of Morgan's support for Neimeyer prior to Morgan's termination, Rossi testified as follows:

Q. When, if ever, did you learn Mr. Morgan supported Mr. Neimeyer?
A. After the election.
Q. And what caused you to come to that conclusion?
A. I just sort of assumed that.

Rossi Dep. at 203. Rossi also testified that he believed that Morgan's appearance at the press conference a few days before the election was designed to assist Neimeyer. Id.[6] From this evidence a jury could conclude that Rossi was aware of Morgan's support for Neimeyer.

[6] A jury could also question Rossi's credibility concerning his purported unawareness of Morgan's political affiliation on the basis of the evidence, discussed above, that contradicts his assertion in his affidavit that he did not know about Lakis' political affiliation with Neimeyer.

In the alternative, Rossi contends that plaintiffs were discharged not because of their support for Neimeyer, but because of poor job performance, conduct unbecoming an officer and insubordination. Rossi contends that Lakis abused sick time privileges, was often absent without permission and engaged in a pattern of insubordination and conduct unbecoming an officer.[7] Rossi contends that Morgan abused sick time, was involved in an incident in which he was abusive and threatening to three incarcerated juveniles, failed to find a replacement for a late night duty assignment, and committed various violations of the Deputy Sheriff Policy Manual stemming from

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[7] As support for this contention, Rossi points to two memorandum that he wrote to Karoly dated December 27, 1998, approximately two months after the election and a week before he dismissed plaintiffs. The memorandum concerning Lakis states:

I have had 4 years to observe the conduct, reliability, prudence and integrity of this individual, and I choose not to recommission him for the following reasons:

1. October 11th, 1993. Sick time abuses. I met with this deputy to discuss, inter alia, sick time abuses. The discussion also included other ways in which he was not meeting my expectations. He was required to provide a physician's note for future absences, and, was told that his overall performance and attitude must improve.

2. February 8th, 1994. Insubordination by Deputy Lakis. He ignored the chain of command and went directly to Ms. Patricia (Keller) Kline of County's Property Services Department to register a complaint about the parking privileges of certain Sheriff Office employees. He demanded to know how and why certain clerks received parking passes. This became an emerging pattern of insubordination and tended to undermine the overall morale of the office.

3. January 26th, 1994. Absenteeism. He told the Chief Deputy that he had a "baby sitter problem" and had to stay home. When I discussed this with him, he denied saying this. This entire matter went to a grievance level and then to the Personnel Review Board, both of which ruled in our favor. He stated as his grievance hearing that his "baby sitting obligations" would always come before his job.

4. October 25th, 1995. Conduct unbecoming an officer. This matter which resulted in a three day unpaid suspension. He has also grieved this matter. Briefly, Lakis became angry, threatening, and rude to his Superiors and co-workers over "some unknown person" allegedly taking a note down from the bulletin board (for him to call his wife). When called into my office to discuss the matter, he refused to do so without an attorney present to represent him, He was told that he wasn't entitled to an attorney every time he spoke to me. He again refused to answer any questions about this incident. He was given a 3 day, unpaid suspension.

the juror incident and the related press conference.[8]

Plaintiffs contend that these reasons are pretextual, and that, in anticipation of this litigation, Rossi wrote these memoranda, dredging up past events that had no affect on his decision to terminate plaintiffs. In support of this contention they point to their contemporaneous performance reports. Rossi reviewed and approved a performance evaluation dated September 20, 1995 which rated

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[8] The memorandum concerning Morgan states:

1. Summer of 1993. It was reported that the photographs which circulated at the Lehigh County Sheriff's Office of a bare ass, was that of Scott Morgan. This photograph was allegedly taken when Mr. Morgan was supposed to be acting as an Ambassador of the Lehigh County Sheriff's Office, to a Police Memorial Event, in Washington, D.C., honoring slain Deputy Sheriff Douglas P. Hartman, who lost his life in the performance of his duties.

2. October 11th, 1993. Documentation of ongoing sick time abuses. Discussion with Deputy Morgan as to the necessity of daily, punctual service.

3. February 18th, 1994. Incident with Deputy Morgan and incarcerated juveniles. Deputy Morgan lost his temper with the 3 juveniles in our office's holding cell. He was abusive, threatening, and most combative. He assaulted 2 juveniles. He was given a day off without pay for this conduct and told that he would be terminated for any future misconduct of any nature.

4. August 28, 1995. Deputy Morgan was assigned to late night duty for the week. He took a vacation day that Monday, the 28th and failed to notify his superiors to find a replacement deputy to cover his assignment. This created a great inconvenience to his superiors and fellow deputies.

5. November 2, 1995. Serious violations of Deputy Sheriff Policy Manual.

a) Sec. 4.33 - Failing to immediately document a serious incident which occurred during his duty assignment. He never provided documentation until November 8th, 1995.

b) Sec. 3.03 - Loyalty to the Office;
Sec. 3.04 - Deputy not to seek publicity
Sec. 3.07 - Politics
Sec. 3.08 - Use of outside influence
Sec. 3.21 - Dissemination of news releases

Approximately 10 days later, deputy Morgan committed the above violations of the Deputy Sheriff's Policy Manual which tended to bring discredit and adverse publicity to the Lehigh County Sheriff's Office. He did this before ever discussing any of the contents, occurrences or circumstances of this matter with any of this [sic] Superiors or the Sheriff. And, in fact, had the Sheriff physically excluded from his news conference.

These violations are of such a serious nature, that they require his termination or, at least his not being recommissioned at the expiration of his present term.

Morgan as excellent in three categories, above satisfactory in the other three categories, and above satisfactory in his overall work performance. Rossi Dep. Ex. 5.[9] Lakis' 1995 performance evaluation, dated September 1, 1995, rated him excellent in two categories and above satisfactory in the other four categories. Id. Ex. 11. His overall evaluation, which was reviewed and approved by Rossi, was above satisfactory. Id.[10] Numerous other deputies sheriffs that were deposed also gave positive evaluations of both Morgan and Lakis. Rossi dismissed Morgan and Lakis in January, 1996 just four months after these evaluations. The proximity of these evaluations to their dismissals could suggest to a jury that job performance was not the true reason for their dismissal.

Plaintiffs also point to evidence suggesting that Rossi linked loyalty to him personally to continued employment in his office. Shortly after the 1995 election he held an impromptu meeting attended by several deputies including plaintiffs. One of those who attended the meeting was then deputy Michael Evans, who is now a Pennsylvania State Police Officer. He testified as follows:

> A. I recall I believe it was Mr. Lakis had asked the question in regard to our supporting Sheriff Rossi, if we failed to do that would our jobs be in any type of jeopardy.
> Q. And what did Sheriff Rossi say?
> A. I can't recall an exact quote of the Sheriff's words. It was to the effect that if I am not supported, why should I support you.

M. Evans Dep. at 14. Lakis also testified that Rossi said, "that during the last election some people were not loyal to him. He talked about outside people, civilians that were wondering why some

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[9] Morgan's performance evaluations in 1992, 1993 and 1994, which were either prepared or approved by Rossi, rated his overall performance as excellent.

[10] Lakis' 1994 evaluation, however, was not as complimentary. He was rated above satisfactory in two categories, satisfactory in three categories and unsatisfactory in one category (work habits). His overall evaluation was satisfactory. In his 1992 evaluation Lakis rated as satisfactory in all categories. The record does not contain a 1993 evaluation.

deputies were still working under him, and that in order to save face he'd have to get rid of some people." Lakis Dep. at 143. A few weeks after this meeting, Rossi dismissed plaintiffs.

After the November, 1995 election and before plaintiffs were terminated, plaintiffs presented evidence that Rossi threatened other deputies with possible employment retaliation. Deputy Sheriff Eric Horwath testified that on numerous occasions Rossi spoke about the importance of employees' loyalty to him, and specifically when Horwath asked Rossi why his name was not on a supervisor's list shortly after the election, Rossi responded, "loyalty is everything to me. I learned about a month ago that you said some things about me and Attorney Karoly. And you contributed a hundred dollars to Neimeyer. As far as I am concerned you will never be a supervisor for me. You can be a Neimeyer supporter forever. You will not get anywhere here." Horwath Dep. at 25. Horwath then asked Rossi whether his job was in jeopardy and Rossi stated, "maybe you should have thought about that before supporting Neimeyer. You might be in jeopardy. . . . You will never get anywhere while I am here." Id. at 25-26.

Deputy Sheriff Andrew Marsh also testified that shortly after the election Rossi threatened him because of his involvement with Neimeyer's campaign. He testified that Rossi told him that he was not happy with Marsh's involvement in the election and that he should watch himself. Marsh Dep. at 31. Additionally, Deputy Sheriff Hanley testified that Rossi threatened her job security. Hanley had appeared in the newspaper photograph with Lakis at Neimeyer's campaign headquarters. She testified that Rossi told her that he could not trust her because she was not loyal to him. Hanley Dep. at 41. Hanley was not terminated, but Rossi put her on probation until she "proved her loyalty to him." He later removed her from probation, telling her to "walk a straight line and prove [her] loyalty to him." Id. at 50-52. Rossi also told her that she was "walking a thin line" and that she had

to watch herself because if he got any bad reports on her she "was done." Id. at 49.

A jury could conclude on the basis of all this evidence that Rossi's articulated reasons for terminating plaintiffs' were pretextual and that he actually terminated them because of their support of Neimeyer. Moreover, the evidence presents a question of fact as to whether Rossi would have terminated plaintiffs regardless of their political affiliation. Defendants' motion for summary judgment on the political discrimination claims will therefore be denied.

C. Free Speech Claim

Morgan's second claim is based on his disclosure of the jury incident at the press conference. To make out his prima facie case on this claim Morgan must establish that (1) the free speech was protected, and (2) that the protected free speech was a substantial or motivating factor in the alleged retaliatory action. Green v. Philadelphia Hous. Auth., 105 F.3d 882, 885 (3d Cir.) (citations omitted), cert. denied, 118 S.Ct. 64 (1997). If Morgan meets this burden, defendants may avoid liability by "demonstrating that the same action would have been taken even in the absence of the protected conduct." Id., quoting Swineford v. Snyder County Pa., 15 F.3d 1258, 1270 (3d Cir. 1994).

The determination of whether the speech is protected requires application of the balancing test established in Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563 (1968). First, the speech must be on a matter of public concern. Green, 105 F.3d at 885. Second, the public interest favoring this expression must outweigh the injury the speech could cause to the interest of the County "as an employer in promoting the efficiency of the public service it performs through its employees." Id., quoting Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). The first determination is a matter of law to be decided by the Court while the second

is normally a factual determination for the jury. Id. at 886-87.

In a recent en banc decision, the Court of Appeals set forth the analysis courts should use to determine if a matter is of public concern. See Azzaro v. County of Allegheny, 110 F.3d 968, 975-980 (3d Cir. 1997) (en banc). Looking to all of the surrounding circumstances including the context and form of the speech the Court asks "whether expression of the kind at issue is of value to the process of self-governance." Id. at 977. Speech questioning whether an government entity is properly discharging its responsibilities or bringing to light actual or potential wrongdoing by a public official relevant to an evaluation of the official's performance is of public concern "barring a form or context that detract[s] from its value to the process of self-governance." Id. at 978 (citing Connick v. Meyers, 461 U.S. 138, 148 (1968)). See also Swineford, 15 F.3d at 1271 (allegation of malfeasance by election officials is speech falling "squarely within the core public speech delineated in Connick"), quoting Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983).

In its public concern analysis, the Court of Appeals also addressed the relevance of the speaker's motive, stating that "the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern." Id.; see also Watters, 55 F.3d at 894 ("Although Watters also may have had some personal motivation for speaking, his speech was not merely an extension of his individual grievances. It had been solicited by a newspaper reporter presumably because the problems it alleged about the Police Department administration touched upon issues of political, social or other concern to the community."); Rode v. Dellarciprete, 845 F.2d 1195, 1201-02 (3d Cir. 1988) (clerk who spoke to newspaper reporter about racial animus and retaliation in state police department was disgruntled employee but speech was nonetheless on matter of public concern); Zamboni v. Stamler, 847 F.2d

73, 75 (3d Cir. 1988) (detective motivated to criticize reorganization of prosecutor's office in part because it was adverse to him still spoke on matter of public concern).

Defendants here contend that Morgan's press conference was not on a matter of public concern because it was motivated by his personal concerns including his support for Neimeyer.[11] I disagree. In a highly publicized trial, a jury had days earlier acquitted a young man who admitted to killing both of his parents. A deputy assigned to protect the sequestered jurors had allegedly made an unwelcome sexual advance toward a juror on the day of the verdict, and the trial judge had not been informed of the alleged sexual advance before the jury rendered its verdict. In addition, Morgan alleges that he was told by the Solicitor of the Sheriff's Office not to disclose the information because of the pending election, thus calling into question the qualifications of an elected official just days prior to the election. It is clear that this speech was "of value to the process of self-governance." Azzaro, 110 F.3d at 977; see also Watters v. City of Philadelphia, 55 F.3d 886, 894 (3d Cir. 1995) (publication in newspaper supported view that speech was a matter of public concern); Monsato v. Quinn, 674 F.2d 990, 997 (3d Cir. 1982) (conclusion that speech was a matter of public concern supported by two radio broadcasts on the issue). I therefore conclude that this

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[11] Defendants also contend that plaintiffs' disclosure of the jury incident is not entitled to First Amendment protection because it included false statements and excluded relevant information. As the Court noted in Azzaro, however:

> "[D]ebate on public issues should be uninhibited robust, and wide-open, and . . . may well include vehement, caustic, sharp attacks on government and public officials. New York Times v. Sullivan, 376 U.S. 254, 270 (1964); see also Bond v. Floyd, 385 U.S. 116, 136 (1966): "Just as erroneous statements must be protected to give freedom of expression the breathing room it needs to survive, so statement criticizing public policy and the implementation of it must be similarly protected." Id. at 386-87.

110 F.3d at 977. Therefore, even if plaintiffs' statements did include false statements and neglected to include relevant information, they were still protected speech.

speech was on a matter of public concern.[12]

Defendants also contend that even if Morgan's speech was protected the value of the expression is outweighed as a matter of law by the Sheriff Office's interest in the effective and efficient fulfillment of its responsibilities to the public. On plaintiffs' side of the balance is their interest in their speech and the public's interest in "free and unhindered debate" on an issue of public importance. Versage v. Township of Clinton N.J., 984 F.2d 1359, 1366 (3d Cir. 1993). As discussed above, "[t]he public has a significant interest in encouraging legitimate whistleblowing so it may receive and evaluate information concerning the alleged abuses of . . . public officials." Watters, 55 F.3d at 895, quoting O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3d Cir. 1989).

Weighed on the other side is the defendants' interest in "the effective and efficient fulfillment of [their] responsibilities to the public." Connick, 461 U.S. at 150. Defendants, however, failed to present sufficient evidence of a disruption to the Sheriff's Office. In their brief, defendants cite Rossi's deposition where he testified that "Morgan's press conference was extremely disruptive and debilitating to the entire operation of the Department, not to mention its esprit de corps. See Rossi Deposition."[13] Rossi Br. at 13. This evidence is insufficient to meet defendants' burden of demonstrating that the interests in the effective and efficient fulfillment of its duties to the public outweigh the public's interest in this speech as a matter of law. As the Court of Appeals explained,

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[12] The County did not attempt to argue that this speech was not of public concern. That position was taken only by defendant Rossi.

[13] Rossi did not include a copy of his deposition in his motion for summary judgment, and I could not find an excerpt supporting this statement from the portions of Rossi's deposition submitted by the other parties. Through my law clerk, I asked Mr. Karoly's office to provide me the portion of Rossi's deposition supporting this statement. As of the date of this Memorandum, he has not provided that portion of the deposition. I will, however, assume for the purposes of this Memorandum that Rossi did make such a statement during his deposition.

"there is a substantial interest in [] revelations [that are] relevant to an evaluation of the performance of the office of an elected official." Azzaro, 110 F.3d at 980. Nothing in the record shows that this "substantial interest" is outweighed as a matter of law by defendants' interest as an employer, and therefore summary judgment for defendants is inappropriate. See id. (holding as a matter of law that the public interest in an allegation of sexual harassment by government employee against superior "is clearly sufficient to outweigh any legitimate countervailing government interest[.]").[14]

D. Whistleblower Claim

Pennsylvania's Whistleblower law, 43 P.S. § 1421 et seq., provides a civil remedy for an employee who is discharged because the "employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." 43 P.S. § 1423(a). Plaintiffs allege that they were discharged in violation of this statute for reporting to District Attorney Steinberg the alleged unwelcome sexual advance by Deputy Wiggins towards a juror. Defendants contend that they are entitled to summary judgment on this claim because plaintiffs' report did not concern "wrongdoing" as that term is defined in 43 P.S. § 1422. I agree.

The legislature took pains to define "wrongdoing" much more narrowly than its common definition:

> "Wrongdoing." A violation . . . of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

[14] Defendants also contend that plaintiffs' speech was not the reason for their discharge. As discussed above, however, plaintiffs presented sufficient evidence of pretext to avoid summary judgment and defendants failed to meet their burden of demonstrating as a matter of law that the same employment action would have been taken regardless of their speech.

§ 1422. Defendants contend that there has been no violation of a "Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics" and therefore plaintiffs do not have a claim under § 1423.

Rather than citing to a statute or regulation that plaintiffs contend Deputy Wiggins allegedly violated, as required by the Whistleblowing Law, plaintiffs, without reference to any authority, argue that because the District Attorney referred the matter to the Attorney General there was a "potential for criminal wrongdoing." Pl. Brief p. 40. The definition of wrongdoing, however, does not include potential violations of statutes or regulations. It includes only actual violations. Deputy Wiggins was not charged with any criminal conduct, and plaintiffs have not identified any regulation or statute that he violated. Accordingly, I conclude that defendants are entitled to summary judgment on plaintiffs' Whistleblowing claim.[15]

E. After-Discovered Evidence

Defendants contend that during the course of defending this action they discovered that plaintiff Lakis engaged in criminal conduct warranting his immediate dismissal, and that they are therefore entitled to summary judgment. Lakis testified that prior to the 1995 election a fellow deputy, Andrew Marsh, gave Lakis copies of gun permits and asked him to deliver them to Neimeyer. Lakis Dep. 70. Lakis knew what the documents were because he opened up the envelope and saw them. Id. at 74. He later delivered the gun permits to Neimeyer who made thousands of

[15] Defendants also contend that plaintiffs failed to present evidence sufficient for a jury to conclude that they were discharged because of their report to District Attorney Steinberg. I agree. See Golaschevsky v. Commonwealth of Pennsylvania, Dep't of Environmental Resources, 683 A.2d 1299, 1304 (Pa. Commw. Ct. 1996) (granting motion for summary judgment because plaintiff failed to produce evidence from which jury could infer causal connection between report of wrongdoing and discharge).

copies of them for use as campaign literature. Id. at 177. Defendants contend they would have been justified in dismissing Lakis because he stole these gun permits and because the circulation of these permits undermined the extensive procedures limiting the licencing of persons to carry concealed deadly weapons.

As the Supreme Court recently made clear, however, after-discovered evidence justifying dismissal is not a complete bar to recovery. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 356 (1995). This evidence is relevant on the issue of damages and it may act as a complete bar to recovery of front pay and reinstatement remedies. Even assuming, however, that defendants were able to meet their burden of proving that they would have terminated Lakis had they known about this evidence at the time of actual discharge, the evidence would not bar recovery of back pay damages from the date of termination to the date of discovery of the evidence. Id. at 361-63. See Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1073-74 (3d Cir. 1995) ("With respect to back pay . . . if Harleysville proves that it would have terminated the plaintiff's employment for the reason revealed by the after-acquired evidence, backpay should run from the discharge to the time that the wrongdoing was discovered[.]" (citations and footnotes omitted). Summary judgment on this ground is therefore inappropriate.

F. Liability of the County

Defendant Lehigh County argues that it is entitled to summary judgment because plaintiffs failed to produce any evidence that Rossi's decision to dismiss plaintiffs was made pursuant to a custom, policy or practice of Lehigh County. See Monell v. New York City Dep't of Social Services, 436 U.S. 568 (1978). Plaintiffs concede the lack of such evidence, but contend that

because Rossi is the County's authorized decisionmaker with regard to employment of County Deputies they need not show that Rossi's actions were pursuant to County policy.

The parties agree that Rossi has "final policymaking authority" with respect to his decisions regarding the employment of his deputies. The parties, however, disagree about whether he is a policymaker for the Commonwealth of Pennsylvania or for Lehigh County. The Supreme Court faced a similar quandary in McMillian v. Monroe County, Ala., 117 S.Ct. 1734 (1997).

McMillian had been convicted of murder and sentenced to death. After his murder conviction was overturned and he was released from death row, he brought a § 1983 action against the County and the County Sheriff alleging that the Sheriff violated his constitutional rights by intimidating witnesses and suppressing exculpatory evidence. Id. at 1736. The district court dismissed the Complaint against the County on grounds that the sheriff was a policymaker for the State and not the County. Both the Court of Appeals for the Eleventh Circuit and the Supreme Court affirmed that holding. Id.

As in this case, the parties in McMillian agreed that the Sheriff was a "policymaker" for § 1983 and Monell purposes, but disagreed about whether he was a policymaker for the State or the County. In deciding that the Sheriff had acted as a policymaker for the State rather than for the County in enforcing the State's criminal laws, the Court stated that it was guided in its decision by two principles. Id. at 1737. "First, the question is not whether [the Sheriff] acts for Alabama or Monroe County in some categorical 'all or nothing' manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." Id. (citations omitted). Thus, the Court did not seek to set forth a rule that would apply to all tasks undertaken by Alabama

sheriffs, but only the category of action at issue in McMillian -- the sheriff's law enforcement capacity.

The second principle guiding the Court's analysis was that the role of the sheriff was largely a product of state law: "our understanding of the actual function of a government official[] in a particular area will necessarily be dependent on the definition of the official's functions under the relevant state law." Id. The Court then analyzed the role of Alabama sheriffs under state law with regard to enforcement of criminal laws.[16]

Under Alabama's Constitution, sheriffs are explicitly included in the executive department of the State. Ala. Const. of 1901, Art. V, § 112. They were added to the executive department in 1901, and the framers took two other significant steps at the same time to "solidify the place of sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions." McMillian, 117 S.Ct. at 1738. They made neglect by sheriffs an impeachable offense in response to reports that sheriffs were allowing mobs to abduct prisoners and lynch them, and they moved the impeachment proceedings from the county courts to the State Supreme Court. Id. The Court stated that it was "critical" to its analysis that the Alabama Supreme Court had "interpreted these provisions and their historical background as evidence of the framers' intent to ensure that sheriffs be considered executive officers of the state." Id. (citations and internal quotations omitted).

The Court then turned from the Alabama Constitution to the Alabama Code, which, although less convincing, supported the Eleventh Circuit's view "to some extent." Supporting the Eleventh

[16] Although the Supreme Court independently reviewed state law, it "defer[ed] considerably to [the Eleventh Circuit's] expertise in interpreting Alabama law." Id. (citations omitted).

Circuit view were the code provisions requiring sheriffs to "attend upon" the state courts in their counties and to "obey the lawful orders and directions" of those state courts, and a provision providing that the state legislature is to set the sheriffs' salaries. Id. at 1738-39. The Court however, stated that the most important code provision was the one defining the sheriff's role in enforcement of the criminal laws. The provision gives sheriffs "complete authority to enforce the state criminal law in their counties. . . . Thus, the 'governing body' of the counties -- which in every Alabama County is the county commission -- cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of the crime." Id. at 1739. In contrast, the governor and the attorney general could direct the sheriff to investigate crimes in their counties and report their findings to them. Id.

Against these provisions, the Court weighed code provisions that required the counties to pay the sheriff's salary and other expenses, that limit of sheriffs' jurisdictions to their counties, and that provide for the election of sheriffs by county voters. The Court concluded that these provisions gave county governments only "attenuated and indirect influence over the sheriff's operations," and that the "weight of the evidence is strongly on the side reached by the Court of Appeals: Alabama sheriffs, when executing their law enforcement duties represent the State of Alabama, not their counties." Id. at 1740.

The question here is whether sheriffs in Pennsylvania act as county or state officials when they decide to dismiss deputies. In contrast to the Alabama Constitution, the Pennsylvania Constitution explicitly states that sheriffs are county officers. See Pa. Const. Art. IX, § 4 (1968). The Lehigh County Charter includes a provision listing the sheriff as an elected officer of Lehigh County. See Lehigh County Home Rule Charter, 339 Pa. Code § 1.2-201. The County's Charter also sets

forth the qualifications and responsibilities of elected county officials, § 1.2-202 and § 1.5-509, the sheriff's salary, § 1.11-1104(a),[17] and the conditions under which the sheriff would forfeit his or her position, § 1.2-206.[18] Sheriffs and deputies are County employees paid by the County, and the sheriff's office (i.e., equipment, staffing, etc.) is also funded by the County. Sheriffs are elected locally and their jurisdiction is limited to the County in which they serve.

As to the actual hiring and firing of individual deputies, neither the Commonwealth nor the County have much input or control over the sheriff's decisions. Both the State and the County, however, have provisions concerning the employment of deputies. Under state law, the sheriff may "appoint such deputies . . . as may be necessary to properly transact the business of his office." 16 Pa. C.S.A. § 1205. A deputy's appointment is revocable by the sheriff at his pleasure. Id. The state legislature has also established certain prerequisites to an appointment as a deputy sheriff, including residency and age requirements, and that the prospective deputy has not convicted of a crime of "moral turpitude." 16 Pa. C.S.A. § 1206.[19] Lehigh County's Charter also has a provision regarding the hiring of deputies. It states that, "[t]he Sheriff shall have the power to appoint deputies, assistants and other personnel required for the conduct of his or her office, in such numbers and job classifications and at such salaries as shall be fixed by the Board." Lehigh County Home Rule Charter, 339 Pa. Code § 1.5-504. Thus, while there are State and County provisions related to the

[17] This provision provides that the sheriff will be paid the higher of the amount listed in § 1.11-1104 or as provided by state law. See 16 P.S. § 11011-2 (setting annual salaries for sheriffs).

[18] There is also a provision in the Pennsylvania Statutes applicable to the removal of county officers. It states that sheriffs, "shall be removable from office only by impeachment, or by the Governor . . . , or upon conviction of misbehavior in office[.]" 16 P.S. § 450.

[19] The prospective deputy is required to submit an affidavit to the prothonotary setting forth that he or she meets the requirements. § 1206.

hiring of deputies, there are no such provisions constraining sheriffs' discretion in dismissing deputy sheriffs.

After balancing the respective roles of Lehigh County and the Commonwealth of Pennsylvania in Rossi's decision to dismiss plaintiffs, as required by McMillian, I conclude that Rossi was acting as a policymaker for the County rather than the Commonwealth. The Pennsylvania Constitution explicitly lists sheriffs as County officials, and they act within their respective counties and on behalf of the County in all respects. They are elected by the County's citizens, and it is those citizens who pay their salaries, buy their patrol cars and fund their offices. In addition, it is the governing body of Lehigh County -- the Board of Commissioners -- which decides how many deputies are required and what their salaries will be. By contrast, the Commonwealth's connection to Sheriff Rossi is remote, and it has no proactive supervisory role whatsoever.[20]

The County contends that because it has no control over the sheriff's decision to dismiss deputies and because it had no policy about dismissing political opponents it cannot be held liable. This argument, however, misinterprets the teaching of McMillian. In McMillian, Alabama did not have a policy of intimidating witnesses or suppressing exculpatory evidence and it had no control over the sheriff's murder investigation, yet the Count concluded that the Monroe County Sheriff was a State policymaker. McMillian does not ask whether either the County or the State has a policy that plaintiff claims violated his constitutional rights or whether the County or State had control over the

[20] See also Reid v. Hamby, 1997 WL 537909, *7 (10th Cir. September 2, 1997) (applying McMillian and holding that Oklahoma Sheriffs are final policymakers for their counties concerning law enforcement activities); Hamilton v. Stafford, 1997 WL 786768, *5 n.1 (N.D.Miss. November 26, 1997) (applying McMillian and holding that Mississippi Sheriffs are final policymakers for their counties concerning law enforcement activities); Hernandez v. County of DuPage, 1997 WL 598132, *8 (N.D.Ill. September 19, 1997)(applying McMillian and holding that Illinois Sheriffs are final policymakers for their counties).

action alleged to have violated plaintiff's constitutional rights. Rather, it asks whether the policymaker's actions that are alleged to form the basis for plaintiff's claim are more fairly attributable to the State or to the County based on state law. I conclude, based on my review of Pennsylvania law, that Rossi's dismissal of plaintiffs is more fairly described as an action on behalf of the County rather than the State. Accordingly, summary judgment for the County on grounds that Rossi did not act as a County official will be denied.

III. Discussion - Disqualification of Karoly

Plaintiffs seek disqualification of Solicitor Karoly, who represents Sheriff Rossi (not the County), pursuant to Pennsylvania Rule of Professional Conduct 3.7(a) which provides that, "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: . . . (3) disqualification of the lawyer would work substantial hardship on the client." I agree that Solicitor Karoly should be disqualified from representing Sheriff Rossi in the trial of this matter.

From my review of the record, Karoly is likely to be a necessary witness. It is Rossi's contention that he made the decision to dismiss plaintiffs long before the November 1995 election. According to his affidavit, he shared that decision with Karoly contemporaneously, see Rossi Aff. ¶ 9, which Karoly confirmed in his deposition, see Karoly Dep. 45, 78. If the jury were to accept this contention, Rossi might have a complete defense to this action. As discussed above, however, plaintiffs are likely to attack Rossi's credibility. Corroboration of Rossi's contention that he planned to dismiss plaintiffs prior to the election is therefore critical to his defense, and the person who can provide that corroboration is Karoly.

According to Karoly's deposition, he and Rossi had a lengthy conversation about the decision to dismiss Lakis, and in that conversation Rossi detailed his rationale for dismissal. Karoly also estimated that he had approximately six conversations with Rossi where Rossi "articulated reservations concerning Mr. Lakis continuing as a Deputy Sheriff." Id. at 61. Additionally, Karoly witnessed the October 25, 1995 meeting between Rossi and Lakis that Rossi contends precipitated his decision to dismiss Lakis. Id. at 33.[21]

In his deposition, Karoly also testified that he and Rossi discussed at length Rossi's decision to dismiss Morgan. According to Karoly, Rossi decided not to recommission Morgan after an incident where Morgan was allegedly abusive and threatening to three incarcerated juveniles, and Rossi stated that he shared that decision contemporaneously with Karoly. Id. at 77-78.[22] Again, corroboration of Rossi's explanation for the dismissal of plaintiffs, especially the timing of those decisions, is critical to his defense and it is clear from the above that Karoly can provide that corroboration with his testimony.

Karoly's testimony is relevant to other issues as well. According to Karoly's deposition, he met with Rossi and several other individuals before Rossi took office. During the course of this meeting, Lakis was discussed as a possible disruptive force in the office and examples of previous unacceptable conduct were given. Id. at 16-18. Karoly also has known Lakis personally for a long time prior to Rossi's taking office and knew him to be "high strung." Id. at 17. Karoly was also intimately involved in the incident concerning the alleged sexual advance toward the juror. Id. at

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[21] See supra note 8.

[22] See supra note 9. Karoly arrived at the Sheriff's office shortly of the incident with the three juveniles, and was there when Deputy Fetzer related the events which he witnessed.

102-109. Karoly was in contact with Rossi and relayed instructions to the deputies on the scene. Significantly, his recollection of these events differ from the testimony of Morgan. Id. at 105.

From all of the above it is clear that Karoly is likely to be a necessary witness[23] which precludes him from representing Rossi unless his disqualification "would work substantial hardship on the client." Pa.R.Prof.Conduct 3.7(a)(3). The comments to Rule 3.7(a)(3) provide the analytical framework for this balancing test:

> Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between lawyer and client. . . . [P]aragraph (a)(3) recognizes that a balancing is required between the interest of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.

Prejudice to plaintiffs in this case is apparent because of the importance of Karoly's testimony. According to Karoly's deposition, he and Rossi spoke often, and frequently alone, about Rossi's decision to dismiss plaintiffs, and Karoly's testimony may also counter the evidence suggesting that Rossi dismissed plaintiffs because of their political affiliation or because of their speech. On one critical point -- the description of the instructions Karoly relayed to Morgan after the incident with the juror -- the testimony of Karoly and Morgan are directly contradictory, again suggesting the importance of Karoly's testimony.

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[23] In fact, Rossi identified Karoly as a possible defense witness in his self-executing disclosure statements and in his answers to interrogatories and plaintiffs listed Karoly as a person having relevant information in their self-executing documents. Although plaintiffs do not argue the point in their motion, they may wish to call Karoly to the stand given his intimate knowledge of the facts at issue.

The County[24] contends that disqualifying Karoly would work substantial hardship on Rossi because Karoly has represented Rossi since the litigation began nearly two years ago, and as Solicitor to the Sheriff rendered legal advice to Rossi for four year prior to the commencement of this lawsuit. This hardship, however, can be eliminated by providing substitute counsel, briefed by Karoly, with sufficient time to prepare a defense. The legal issues concerning Rossi are not complex and the factual record is fully developed. I therefore conclude that plaintiffs' motion to disqualify Karoly will be granted. Trial for this matter is set for July 20, 1998 and Rossi is directed to begin immediately the process of hiring substitute counsel so as to not delay the trial beyond.

[24] The County filed a response to the disqualification motion, but Rossi has not. Through my deputy clerk, I asked Mr. Karoly when he intended to file a response on behalf of Rossi. He first suggested that I decide the motion for summary judgment before deciding the disqualification motion. After I informed him, again through my deputy clerk, that I would be deciding both motions at the same time, he stated that he would file a response by Wednesday March 18, 1998. As of the date of this Memorandum, Mr. Karoly had yet to file a response on behalf of Rossi.

In THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCOTT A. MORGAN, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
RONALD W. ROSSI, et al.	:	No. 96-1536

O R D E R

AND NOW this day of April, 1998 upon consideration of defendants' motion for summary judgment, plaintiffs' motion to disqualify defense counsel, John P. Karoly, and the parties' filings related thereto, it is hereby ORDERED that:

1. Defendants' motions for summary judgment on the Whistleblower claim are GRANTED and judgment is entered for defendants and against plaintiffs on that claim;

2. Defendants' motions for summary judgment are otherwise DENIED;

3. Plaintiffs' motion to disqualify defense counsel John P. Karoly is GRANTED;

4. Trial in this matter is set for Monday July 20, 1998;

5. Defendant Rossi is directed to begin immediately the process of retaining new counsel so as to not delay the trial; and

6. The parties will file their pretrial memoranda and points for charge by July 13, 1998.

THOMAS N. O'NEILL, JR. J.